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In the Supreme Court of the United States

OCTOBER TERM, 1980

TEXPORTS STEVEDORE COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

MURL J. WINCHESTER AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a stevedore company's "gear room," located near but outside the fenced dock area at the Houston Shipping Channel, is in an "adjoining area customarily used" in the loading or unloading of vessels, within the meaning of Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alabama Dry Dock & Shipbuilding Co. v. *Kininess*, 554 F.2d 176, cert. denied, 434 U.S. 903	4-5
Brady-Hamilton Stevedore Co. v. *Herron*, 568 F.2d 137	7
Maxin v. *Dravo Corp.*, 2 B.R.B.S. 372, aff'd, 545 F.2d 374, cert. denied, 433 U.S. 908	4
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249	8, 12
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69	10
Prolerized New England Co. v. *Benefits Review Board*, 637 F.2d 30, petition for cert. pending, No. 80-1609 (filed Mar. 23, 1981)	12-13
Voris v. *Eikel*, 346 U.S. 328	8

Statute:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	3
Section 2(3), 33 U.S.C. 902(3)	3
Section 3(2), 33 U.S.C. 903(a)	3-4, 5, 6, 8, 9, 10
Section 8(c)(20), 33 U.S.C. 908(c)(20)	4
Section 28(a), 33 U.S.C. 928(a)	4

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. A-1 to A-32) is reported at 632 F.2d 504. The opinion of the panel of the court of appeals (Pet. App. D-1 to D-5) is reported at 554 F.2d 245, and the panel's modification of that opinion on rehearing (Pet. App. C-1 to C-2) is reported at 561 F.2d 1213. The opinion of the Benefits Re-

view Board (Pet. App. E-1 to E-5) is reported at 4 B.R.B.S. 447. The opinion of the administrative law judge (Pet. App. G-1 to G-13), and his opinion on reconsideration (Pet. App. F-1 to F-2), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1980. The petition for a writ of certiorari was filed on March 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Texports Stevedore Company loads and unloads ships at the Port of Houston, Texas. Texports has three "gear rooms," which are facilities for the maintenance and storage of stevedoring equipment used at the Houston Shipping Channel (Pet. App. A-2 to A-3). The same superintendent supervises all three gear rooms. Two of the gear rooms are on the wharves immediately along the ship channel. The third gear room is at 74th Street and Avenue N, five blocks from the nearest gate to the fenced wharf area. Texports maintains this gear room outside the fenced area because its gear facilities on the wharves could not be expanded, and because the wharves did not have adequate space for an additional gear room. Other stevedore companies also maintain gear rooms outside the fenced area because of the shortage of space on the wharves. Texports placed its third gear room as close to the wharves as it could. Houston Port Authority property extends to within approximately half a block from the Avenue N gear room (Pet. App. A-3, G-3).

Respondent Murl J. Winchester, a longshoreman, was employed as a "gear man" by Texports (Pet.

App. A-2). He reported to the Avenue N gear room at the beginning of each work day to receive his work assignment. His duties included maintaining, repairing, and supplying the equipment that the stevedores used in handling cargo. Winchester performed work at each of Texports' gear rooms, at the gear rooms of other stevedore companies, at dockside, and on board ships. On days when Texports was loading or unloading cargo, Winchester would travel over the public streets connecting the various gear rooms and wharves to service several ships. Even when Texports was not loading or unloading ships, gear room work continued in order to repair and maintain gear for the next loading and unloading operation (Pet. App. A-3 to A-4).

On June 3, 1974, respondent Winchester was injured at the Avenue N gear room in the course of his employment with Texports. The injury occurred when he tripped and fell against a forklift, striking his face (Pet. App. A-4).

2. Respondent Winchester filed a claim for compensation for serious facial disfigurement under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* An administrative law judge found that Winchester was a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. G-8). The administrative law judge further found that Winchester was injured at a covered situs within the meaning of Section 3(a) of the Act, 33 U.S.C. 903(a), which provides that compensation is payable only for injuries occurring "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or

other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)" (Pet. App. G-9 to G-10). The administrative law judge ruled that Winchester had not suffered "serious disfigurement" within the meaning of the Act, 33 U.S.C. 908(c)(20), but that he was entitled to medical benefits and attorney's fees, pursuant to Section 28(a) of the Act, 33 U.S.C. 928(a) (Pet. App. G-11 to G-13).

The Benefits Review Board sustained the administrative law judge's decision (Pet. App. E-1 to E-5). With respect to the site of respondent Winchester's injury, the Board stated (*id.* at E-4) (citation omitted):

> [A]n adjoining area must be deemed bounded only by its use as a maritime enterprise. The Avenue N gear room although five blocks from any wharf was placed in a location that would provide easy access for the gear men to service vessels on both sides of the [Houston shipping] channel. It clearly played an integral part in employer's overall maritime enterprise thereby qualifying as an adjoining area under the Act.

The Board relied in this regard on its earlier decision in *Maxin* v. *Dravo Corp.*, 2 B.R.B.S. 372 (1975), aff'd, 545 F.2d 374 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977).

Petitioners, Texports and its workers' compensation insurance carrier, sought judicial review, and a panel of the court of appeals affirmed the Board's decision (Pet. App. D-1 to D-5). On petitioners' request for rehearing on the situs issue, the panel modified its opinion in light of the earlier opinion of another panel of the same court in *Alabama Dry*

Dock & Shipbuilding Co. v. *Kininess*, 554 F.2d 176, cert. denied, 434 U.S. 903 (1977) (Pet. App. C-1 to C-2).[1]

On petitioners' second petition for rehearing, the court of appeals reheard the case en banc and affirmed the Board by a 15 to 8 vote (Pet. App. A-1 to A-32). The court held that respondent Winchester's injury occurred in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," within the meaning of Section 3(a) of the Act. The majority reasoned that, although "adjoining" can mean "contiguous to" or "bordering upon," it can also be defined as "close to," "near," or "neighboring" (Pet. App. A-20). To define the statutory term "adjoining" as requiring "absolute contiguity," the court stated, "would be to reenact the hard lines that caused longshoremen to

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[1] The original panel decision stated (Pet. App. D-5):

> Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room several blocks away. * * * [T]he N Avenue gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes as provided by the statute. Acknowledging the distance from the gear room to the water, we cannot, after giving the Act a liberal construction, reverse respondent's coverage just because the harbor area provided inadequate facilities for Texports to house their equipment.

On rehearing, the panel withdrew that language and substituted the following language (Pet. App. C-2):

> Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room which, though five blocks away, adjoined the docks and associated buildings. See *Alabama Dry Dock and Ship Building Co.* v. *Kininess*, 554 F.2d 176, 178 (5th Cir. 1977).

move continually in and out of coverage [before the 1972 amendments to the Act]" (*ibid.*). In the court's view, this "would frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity" (*ibid.*). On the other hand, the court said, giving the term "adjoining" a broader definition "is in keeping with the spirit of the congressional purposes" (*ibid.*). Accordingly, the court concluded that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the [Act]" (*ibid.*).

The court of appeals also ruled that, even if the term "adjoining" were thought to require "strict contiguity" with actual navigable waters, the situs test of Section 3(a) would be satisfied here (Pet. App. A-20 to A-24). The court stated that the statutory term "area" is "a broad term, and the overall area within which the gear room was located does 'adjoin' navigable waters" (*id.* at A-21). The statutory boundary of the term "area," said the court, is determined by the inland reach of customary maritime usage; that is, an area is a covered situs if it is "customarily used by an employer in loading, unloading, repairing, or building a vessel" (*ibid.*). The area need not be devoted exclusively to maritime activity; it is covered by Section 3(a) "so long as it is customarily used for significant maritime activity" (*ibid.*). The court concluded that substantial evidence supported the determination by the administrative law judge and the Benefits Review Board that the Avenue N gear room is in an area customarily used for maritime purposes (*id.* at A-22 to A-23). The court specifically emphasized in this connection the administrative law judge's findings that "the gear room was 'in the most desirable position for servic-

ing the docks in the Port of Houston,' and that the gear rooms of most stevedores were not on the docks proper" (*id.* at A-22).

ARGUMENT

The decision of the court of appeals is correct and focuses entirely on a relatively unusual factual situation found in few, if any, of the other reported decisions under the Longshoremen's and Harbor Workers' Compensation Act. Although petitioners stress that approximately 50% of the accidents covered by the amended Act have occurred on shore rather than aboard a vessel, the relevant consideration regarding the importance of this case is the number of workers injured on shore but outside a clearly delineated "pier, wharf, dry dock, terminal, building way, [or] marine railway," who have claimed benefits under the Act. Petitioners have cited only one other case involving such a claimant, and they have adduced no additional evidence that the problem addressed by the court of appeals here is a major one in the administration of the Act. Moreover, the facts involved in the sole comparable case cited by petitioners were very similar to those presented here, and the Ninth Circuit reached the same result as the court below. *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978). There is no conflict among the circuits, and the court of appeals' decision is consistent with the rulings of this Court under the LHWCA. Further review therefore is not warranted.

1. As originally enacted in 1927, the LHWCA covered injuries that occurred "upon navigable waters." In 1972 Congress extended the coverage of the Act landward by defining "navigable waters

of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. 903(a). As this Court recognized in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), the congressional motivation for this extension was "a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered for only part of their activity." Congress sought to eliminate the unsatisfactory situation in which maritime workers walked into and out of federal coverage during the performance of their ordinary duties on the job. Under the amended statute, coverage was not intended to "depend on the 'fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water.'" *Id.* at 272.

In addition, as this Court also recognized in *Caputo*, "[t]he language of the 1972 Amendments is broad and suggests * * * an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" 432 U.S. at 268, quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

The court below adhered to these principles in determining the scope of the phrase "adjoining area" as it is used in Section 3(a) of the Act. As the court explained, the congressional purpose underlying the 1972 amendments is best served by construing the word "adjoining" to include sites that are "close to or in the vicinity of navigable waters, or in a neigh-

boring area" (Pet. App. A-20).[2] Furthermore, even if "adjoining" is thought to require strict contiguity, the term "area" must also be read in a way that effectuates the purposes of the Act (see *id.* at A-20 to A-21). An "adjoining area" is not limited to those sites that come within "fencelines and employers' designations" (*id.* at A-21).[3] Instead, the proper test

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[2] As Professors Gilmore and Black have observed (see Pet. App. A-20 n.19), the unquestioned statutory coverage of all "terminals" adjoining navigable waters plainly reflects a legislative intent to reach areas a considerable distance from actual navigable waters. In this very case, although the court of appeals did not rely on the theory, there is a strong argument that the gear room in which respondent Winchester was injured was part of the terminal at the Port of Houston Shipping Channel, notwithstanding its location outside the controlled access area. It is undisputed that the gear room was situated as it was only because of a shortage of space within the terminal gates. Petitioners concede (Pet. 5 n.3) that the "fence line per se" is not necessarily the boundary of the area covered under Section 3(a), but they assert that the fence in this case "is in fact the boundary of the area adjoining navigable waters and is therefore the boundary of shoreside situs." Petitioners offer no explanation of the method by which they propose to determine whether a fence is or is not the relevant line for purposes of Section 3(a).

[3] If petitioners are correct that the Avenue N gear room is not a covered situs because it lies outside the controlled-access wharf area, it would be an easy matter for employers drastically to limit their potential liability under the Act. Employers could simply insist that all the most dangerous tasks typically assigned to "gear men" be performed at a gear room outside the fenced-in area rather than one closer to the water. In this way, employers could insure that the jobs most likely to result in injuries would never be performed on a covered situs. But Congress deliberately sought to prevent such employer manipulation of work assignments

of the boundaries of a covered "adjoining area" is supplied by the statute—whether the area is "customarily used by an employer in loading, unloading, repairing, or building a vessel." As the court of appeals held (*id.* at A-24), this interpretation of the situs requirement "reduces the number of workers walking in and out of coverage and promotes uniformity. It also is in line with the congressional desire to extend coverage to those maritime chores that technology has moved ashore" (footnote omitted).

Reviewing courts need not be troubled by petitioners' warnings about the potential for unlimited expansion of "navigable waters" as defined in Section 3(a) of the Act. To begin with, no such problems have arisen in the decade since Congress expanded the situs test. Moreover, commercial realities will limit the places "customarily used by an employer" in loading or unloading a vessel to locations close to actual waterways. Here, for example, Texports maintained one of its gear rooms outside the fenced-in wharves because the wharves did not have adequate space for an additional gear room or expansion of Texports' existing gear facilities. Most of the gear rooms of other stevedore companies were similarly located outside the terminal fence (Pet. App. G-3, A-3, A-25). Texports' Avenue N gear room and the gear facilities of other stevedores outside the wharf gates were located a convenient distance from the wharf area (*id.* at G-3, E-4, A-3). Petitioners concede (Pet. 3) that respondent Winchester performed maritime work in all of Texports' gear rooms, at

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in order to avoid coverage under the Act. As this Court observed in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 (1979), "Congress did not intend the Act's coverage to shift with the employer's whim."

dockside, and on board ships. Yet, under petitioners' reading of the Act, Winchester's injury at the Avenue N gear room did not occur on a covered situs simply because the facility is located outside the wharf fence.[4] Congress could not have intended such an anomalous result. The business reality is that growing ports may not have sufficient space to house expanding maritime facilities inside designated terminal areas. As the court below recognized, "[g]row-

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[4] Petitioners apparently do not argue that, as a matter of sheer distance, the Avenue N gear room is too far from the water to be considered part of an "adjoining area." On the contrary, petitioners seem to concede not only that respondent Winchester's injury would have been covered had it occurred at one of the other Texports' gear rooms but also that it would have been covered if the controlled-access wharf area at the Houston Shipping Channel had been large enough to include the Avenue N gear room. This case therefore does not present the extreme situation, distinguished by the court of appeals (Pet. App. A-21), in which a facility used for maritime purposes is located miles from the nearest navigable water, in the center of an urban downtown area. In such a case, petitioners might contend that the facility's distance from the water is so great that Congress could not possibly have contemplated its inclusion in the phrase "adjoining area." Here, however, petitioners rely primarily, if not exclusively, on the fact that between the fenced-in wharf area and the Avenue N gear room lie several "buildings, thoroughfares and activities of a diverse and non-maritime nature" (Pet. 4). That fact, though, is purely fortuitous and bears no relationship to any consideration that Congress might have had in mind in adopting the situs requirement. Congress sought to protect longshoremen throughout the course of their working day, and the accomplishment of this purpose should not be affected by whether commercial establishments of a non-maritime nature are interspersed among maritime facilities or are segregated outside a single terminal area that includes all the maritime facilities at a given port.

ing ports are not hemmed in by fence lines; the Act's coverage should not be either" (Pet. App. A-18).

2. The principal concern of the dissent below (Pet. App. A-28 to A-29), echoed by petitioners (Pet. 20), is that the court of appeals has adopted an uncertain standard that will produce endless litigation on situs questions. This prediction is inaccurate. The statutory standard, as applied by the court of appeals, is not uncertain, for it contains the essential geographic component of the situs requirement. As the court below explained (Pet. App. A-21), the statute itself has established the boundaries of coverage: a site is not covered unless it is "customarily used" for maritime purposes. Thus, the site involved in any particular case "must have some nexus with the waterfront" (*id.* at A-19). This test may not provide the brightest possible line between covered and non-covered areas, but Congress in 1972 deliberately rejected a mechanical approach to coverage questions, because arbitrary boundary lines produce a lack of uniformity of coverage and hardship to maritime workers. The standard adopted by the court of appeals provides the certainty, which Congress intended, that maritime employees will be covered for injuries suffered in all "the waterfront areas where the overall loading and unloading process occurs." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 272.

3. The decision of the court below does not conflict with the decision of the First Circuit in *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30 (1980), petition for cert. pending, No. 80-1609 (filed Mar. 23, 1981). In that case, the court said that "the site of the injury must adjoin navigable waters, not a loading area" (*id.* at 38). The court went on to explain that a covered "adjoin-

ing area" does not have to be used exclusively for maritime purposes and that a liberal construction of "adjoining area" is necessary to effectuate the purposes of the 1972 amendments. *Id.* at 39. In the court's words, "[a] crazy quilt pattern of situs coverage tracking the indistinct line between [the employer's] manufacturing and loading operations would produce uncertainty and confusion for employer and employees alike" (*ibid.*). The decision in *Prolerized New England Co.* is thus consistent with the court of appeals' holding in the present case that the boundaries of situs coverage are determined by whether a site is used for maritime functions.[5]

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[5] The court of appeals in *Prolerized New England Co.*, like the Fifth Circuit here, upheld the Benefits Review Board's decision that the employee's injury was covered by the Act. The pending petition for a writ of certiorari in the First Circuit case does not present any question concerning the site at which the injury occurred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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